No. 11736

In the United States
CIRCUIT COURT OF APPEALS
for the Ninth Circuit

E. ROYCE, B. ROYCE and A. H. WENCK, doing business as Gray Line Tours,

Appellants,

vs.

CLARK SQUIRE, Collector of Internal Revenue for the District of Washington.

Appellee.

APPELLANTS' REPLY BRIEF

Upon Appeal from the District Court of the United States for the Western District of Washington Southern Division.

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The letter B as herein used refers to the brief of the Appellee.

REPLY TO APPELLEE'S ARGUMENT HEADED: "A. THE REGULATIONS CORRECTLY DEFINE THE TERM 'OPERATED ON AN ESTABLISHED LINE'." (B. 9)

Boiled down to its essential essence the Appellee's argument on this point is that the Commissioner's in-

terpretation of the term "operated on an established line" as set forth in Regulation 42, Section 130.58 is correct because within approximately eighteen months after the Regulation was promulgated Section 3469, I.R.C. was twice amended as to rates. These amendments did not reenact the wording of Section 3469. They merely provided that "5 per centum" and then "10 per centum" be changed to "10 per centum" and "15 per centum" respectively. Section 609, Revenue Act of 1942, and Sec. 302, Revenue Act of 1943.

In view of differences in the facts, the cases of *Helvering v. Winmill,* 305 U.S. 79; *Helvering v. Reynolds Co.,* 306 U.S. 110; *Crane v. Commissioner,* 331 U.S. 1, and *Mass. Mutual Life Ins. Co. v. United States,* 288 U.S. 269, obviously do not support the points for which they are cited by the Appellee. While in the *Crane case, Supra,* the Supreme Court held that the Regulation under discussion had the force of law, the true rule with respect to the force and effect of Regulations is stated in the case of *Morrill v. Jones,* 106 U.S. 466, and *Allis v. LaBudde,* 128 F. 2d 838, cited by the Appellants on page 21 and 22 of their brief, and in the case of *F. W. Woolworth Co. v. U.S.,* (1937) 91 F. 2d 973, 976.

The so called doctrine of legislative acquiescence cannot in and of itself result in a conclusive interpretation of a statute. It cannot bind a court. In the recent case of *Jones v. Liberty Glass Company,* (1947) 92 L. Ed. 195, 200, 68 S. Ct. 229, 234, the Supreme Court of the United States said:

> " . . . But the doctrine of legislative acquiescence is at best only an auxiliary tool for use in interpretating ambiguous statutory provisions."

In the *Woolworth case, supra,* Judge L. Hand said:

> "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; our fiscal legislation is detailed and specific enough already. While we are of course bound to weigh seriously such rulings, they are never conclusive;"

It is noteworthy that in the *Crane Case, Supra,* the court said (6):

> "In the *first* place, the words of statutes—including revenue acts—should be interpreted where possible in their ordinary, everyday senses." (Italics ours)

Appellee states that the principal question is whether the said Section of the Regulation properly construes Section 3469, I.R.C. (B. 10). The principal question, however, is whether or not the Appellants were operating their vehicles on an established line.

The Appellants contend that neither the Internal Revenue Code nor the Regulations define the meaning of the words "established line" as used in the statute, and that the meaning of those words must be determined before the term "operated on an established line" can have meaning. In promulgating Section 130.58 of Treasury Regulations 42 the Commissioner of Internal Revenue must have had a preconceived meaning of the

words "established line" as used in the statute, or the words he used in Section 130.58 of Treasury Regulations 42 in defining "operated on an established line" are without meaning. But as there is no indication in either the Statute or the Regulation of the meaning of the words "established line" we are forced to seek their true meaning in this action unfettered by administrative interpretation.

Appellee admits the words "established" means "permanent", "recurring" or "regular" (B. 11). In *Wells Lamont Corp. v. Bowles,* 149 F. 2d 364, 366 (Em. App.), cited by Appellee the words established was said to mean:

> "To establish is to make stable or firm; to fix in permanence and regularity, to settle or secure on a firm basis, to settle firmly or to fix unalterably."

In *U. C. C. v. Collins,* 182 Va. 426; 29 S.E. 2d 388, 393, the court said:

> "An 'established' business is one that is permanent, fixed, stable or lasting."

Appellee contends that where there is doubt as to the construction of a statute the interpretation of the law by the department enforcing it is held to be controlling where not arbitrary or unreasonable (B. 11). The point of law expressed here is not in issue since the Treasury Department has not placed an interpretation upon the meaning of the words "established line" as used in the statute.

There is no logic to the argument propounded on the bottom half of page 13 and the top half of page 14 of Appellee's brief. There is nothing to indicate that a Regulation promulgated in connection with a statute passed in 1918 and repealed in 1922 had such legislative approval that the only thing the Commissioner could do in 1942 was to promulgate without material change a definition of "established line" embodied in the earlier Regulation. As indicated no definition of "established line" is attempted in the latter Regulation.

Appellee states that "the regulatory provisions have remained substantially unchanged since 1918, and during that period, Congress repeatedly has reenacted the provisions of the revenue laws on which they are based" (B. 14). Prior to the above quote statement of fact Appellee stated that the transportation tax had been repealed in 1922 (B. 13). Clearly one of the statements of fact is incorrect. The fact is, Congress has not repeatedly reenacted the provisions of the revenue laws upon which the regulatory provisions are based.

REPLY TO APPELLEE'S ARGUMENT HEADED: "B. THE EVIDENCE SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT TAXPAYERS VEHICLES WERE OPERATED ON A ESTABLISHED LINE." (B. 15)

To support its position Appellee states that the testimony showed the limousines were operated with "rea-

sonable" regularity (B. 15). The term "reasonable regularity" is completely foreign to both the statute and the regulation. Appellee has erred grossly in stating that "all operations were between definite points, Boeing Field Airport on the one hand, and the downtown area of Seattle on the other hand" (B. 15). Facts to the contrary are supported by uncontradicted evidence (T.R. 57, 69, 78). Appellee states that the only persons authorized to dispatch the limousines were taxpayers employees (B. 16). In and of itself this means nothing. The essential fact is that the limousines were ordered out for the purposes with which we are concerned only upon instructions or orders from the airlines (R. 97, 98, 116, 118, 120, 129). The airlines had the right to give such instructions (Ex. 1).

The conclusions drawn by Appellee in the paragraph on page 16 of his brief beginning with the word "Hence" are obviously not supported by the evidence as pointed out with particularity on page 17 through 25 of Appellants' brief.

REPLY TO APPELLEE'S ARGUMENT HEADED: "THE DISTRICT COURT DID NOT COMMIT REVERSIBLE ERROR BY ADMITTING EXHIBIT A-1 INTO EVIDENCE." (B. 16)

On pages 13 and 14 of the Appellants' brief it was shown that the admission of Exhibit A-1 was error, but Appellee contends that Appellants have not shown that

the admission of Exhibit A-1 was prejudicial. Appellee further contends that there was testimony which would corroborate the statements in the letter (B. 17) and the admission was not therefore prejudicial. A scrutiny of the testimony referred to indicates material differences in the statements made in Exhibit A-1 and the testimony cited by Appellee on page 17 of his brief.

The inferences to be drawn from the statements in the letter are clearly contrary to the true facts as brought out by admissible testimony and therefore the admission of Exhibit A-1 was reversible error (R. 61, 71, 81, 85, 93, 94, 96, 102, 103, 110, 111, 118, 120, 127, 128).

In the case of *McCandless v. United States,* (1936) 298 U.S. 342, 349, the court said:

> "This, as the language plainly shows, does not change the well-settled rule that an *erroneous ruling* which relates to the substantial rights of a party *is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.*" (Italics ours)

The case of *United States v. Crescent Amusement Co.,* 323 U.S. 173, cited by the Appellees (B. 17) follows the above rule of law for the court examined the whole record and found that other evidence was sufficient to establish the restraint of trade. Thus the record in that case affirmatively established that the admission of the evidence was not prejudicial. In the case at Bar the statements in Exhibit A-1 and the testimony cannot be harmonized with respect to the drivers being required to follow a specified route (R. 61, 93, 94, 102, 127, 130,

131). The whole record does not affirmatively show that the admission of Exhibit A-1 was not prejudicial and such admission is therefore reversible error.

REPLY TO APPELLEE'S ARGUMENT HEADED: "ADDITIONAL FINDINGS OF FACT WERE NOT NECESSARY." (B. 18)

We agree that the findings should state only ultimate facts and virtually said so on page 26 of Appellants' brief, but once having undertaken to go into detail it became the court's duty to make findings upon *all* the facts bearing upon the question of whether Appellants were "operating on an established line" rather than only upon some of them. The Appellee may also be right in his footnote at page 15 of his brief in saying, in effect, that the court's Conclusion of Law I appears to be more properly a finding than a conclusion. Appellants said substantially the same thing (R. 43-44, Appellants' Brief 26, 27), but whatever it is it is contrary to and not supported by the evidence.

Appellee contends that the trial court's findings of fact and conclusions of law furnish a clear understanding of the basis of the District Court's decision (B. 19). This hypothesis may be true but the conclusion does not follow that the decision of the trial court is correct. In the case of *United States v. Forness,* 125 F. 2d 928, 942 (C.C.A. 2), cited by the Appellant, the court said:

> "We stress this matter because of the grave importance of fact finding. The correct finding, as near as may be, of the facts of a law suit is fully as important as the application of the correct legal rules to the facts found. An impeccably 'right' legal rule applied to the 'wrong' facts yields a decision which is as faulty as one which results from the application of the 'wrong' legal rule to the 'right' facts."

The trial court said its Conclusions of Law were based upon the facts found (Tr. 33). The whole record clearly indicates that many of the facts clearly established by the evidence bearing directly upon the question of whether the Appellants were operating on an established line were not found by the trial court. From the foregoing it is readily apparent that the omission is prejudicial error.

INACCURATE FACTUAL STATEMENTS

There are some inaccurate statements of fact in Appellee's brief. For example Appellee says that it is undisputed that the primary contract between taxpayers and the passengers was for the transportation of passengers and not for hire or use of the vehicle, and he cites page 9 of the printed Transcript to support the statement (B. 16). An examination of page 9 of the Transcript shows the principal activity of Appellants in the field of local transportation has consisted of the transportation of persons, but that its agreements with the airlines was "to provide limousine service". Somewhat

akin to this, Appellee states the Appellants entered into an agreement with United Airlines to provide "transportation by limousine for United's passengers to and from Boeing Airport in Seattle", and cites page 26 of the Transcript in support (B. 3). Page 26 of the Transcript says the contract was to provide "transportation service" to and from said places. Appellants drove their limousines where and when they were directed by the airlines.

Appellee also states that the limousine drivers were instructed by taxpayers to follow the most direct route to the airport, and he cites page 28 and 29 of the Transcript in support (B. 5). Said pages of the Transcript do not state who gave such instructions, and we have found nothing further in the record with respect to who did. Appellee failed to point out that page 29 of the Transcript also says, the drivers "were free to and did select the streets over which they travelled, and they usually used Southwest Fourth Avenue or Airport Way when going to and from Boeing Field, as the trip over either street is of equal distance, but in cases of traffic congestion or when streets were undergoing repairs, the drivers themselves selected other streets upon which to travel." The record clearly shows the Appellants did not specify to the drivers what streets to use (R. 61, 93, 94, 102, 110, 127, 130, 131).

CONCLUSION

Appellee has not shown that Appellants' defiinition of "established line" was erroneous, and Appellants in their brief have shown that they were not operating their limousines on an established line within the meaning of the statute. Therefore, the judgment of the trial court should be reversed.

Respectfully submitted,

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